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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81 6340

RICHARD LEE DAWSON,

Petitioner,

-vs-

STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF NEW YORK

APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

EDWARD JOHN NOWAK, ESQ.
Monroe County Public Defender
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Rochester, New York 14614

Attorney for Petitioner

QUESTIONS PRESENTED

1. Whether Section 4 of the Judiciary Law of the State of New York, construed by the New York Courts to bestow unfettered discretion upon trial judges to close portions of criminal trials over the objections of defense counsel, is violative of the Sixth, First, and Fourteenth Amendments of the United States Constitution.

2. Whether Section 4 of the Judiciary Law of the State of New York, as applied to the facts of this case wherein the public, including the petitioner's mother, was excluded in the absence of any claim, demonstration or finding of necessity, is unconstitutional in derogation of the Sixth, First and Fourteenth Amendments.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No.

RICHARD LEE DAWSON,

Petitioner,

-vs-

STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW YORK
APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Appellate Division, Supreme Court of New York, Fourth Judicial Department, affirming petitioner's conviction for Rape, First Degree and Robbery, Second Degree.

OPINIONS BELOW

The order and majority memorandum opinion of the Appellate Division are contained in the Appendix at A-2 and A-3. The dissenting opinion is contained in the Appendix from A-4 thru A-9. The decision is published at 444 N.Y.S.2d 333, ___A.D.2d___ (11/13/81). By order of the Honorable Domenick L. Gabrielli, Associate Judge of the New York State Court of Appeals, the petitioner was denied leave to appeal to this state's highest court. (Appendix, A-1).

JURISDICTION

The judgment of conviction became final in all respects when the Court of Appeals denied petitioner's application for leave to appeal from the order of the Appellate Division, Fourth Department, which affirmed the conviction of the New York State Supreme Court, Monroe County. The order of the Court of Appeals was entered on January 7, 1982. Since the constitutionality of a statute of the State of New York has been drawn in question, 28 U.S.C. §2403(b) may be applicable and a copy of this petition for certiorari, as well as the motion to proceed in forma pauperis and its supporting affidavit, has been served on the Attorney General for the State of New York. This Court's jurisdiction in invoked under 28 U.S.C. Section 1257(3).

STATUTE INVOLVED

The text of Judiciary Law §4 is as follows:

"The sittings of every court within this state shall be public, and every citizen may freely attend the same, except that in all proceedings and trials in cases for divorce, seduction, abortion, rape, assault with intent to commit rape, sodomy, bastardy or filiation, the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses, and officers of the court.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV §1

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner was convicted after a bench trial of rape, first degree and robbery, second degree on December 3, 1976.

The primary witness against the petitioner was the complainant, Miranda Haley. Prior to her testimony the prosecutor asked the Court to exclude the spectators from the courtroom in view of the fact that Ms. Haley was the victim in a rape case. (Appendix, A-10) Defense counsel objected to the application for closure (Appendix, A-10 and A-11). The trial court ruled that the public, except for the press, would be excluded from the courtroom during Ms. Haley's testimony. Included in the court's order of exclusion was the petitioner's mother. (Appendix, A-12)

Ms. Haley testified that on March 20, 1975, a man she identified as the petitioner knocked on the door of the group home, where she worked as a resident counselor, asking to use the telephone. Ms. Haley allowed the man in and after using the phone, he refused to leave. Instead, he threw Ms. Haley down the basement stairs, causing "a little bit of a cut" and soreness, which lasted about a week. The man asked her for some money, and she led him to a desk from which he took about $20.00. Ms. Haley testified that she was then taken upstairs to the bedroom of one of the residents of the group home where she engaged in sexual intercourse out of fear that resistance would result in her injury. She testified that the act of intercourse lasted for only thirty seconds and that the man did not ejaculate. After her testimony, the courtroom was open to the public and twelve other witnesses were called by the prosecution.

The defendant presented an alibi defense in an effort to establish that he was with his father on his way to work at the time this incident was alleged to have occurred.

The trial court found the defendant guilty of rape, first degree; robbery, second degree; assault, second degree; and petit larceny. The Court, sua sponte, dismissed the assault and larceny counts as lesser included offenses.

The Court later sentenced the petitioner on the rape conviction to an indeterminate term of imprisonment having a minimum of eight and one-third years and a maximum of twenty five years. The Court imposed a lesser sentence on the robbery count to run concurrently with the sentence for the rape conviction. These sentences were ordered to run consecutively to a previously imposed sentence of five to fifteen years.

REASONS FOR GRANTING THE WRIT

I: The questions presented in the context of the Sixth Amendment are substantial, as evidenced by the noting of probable jurisdiction in Globe Newspaper Co. v. Superior Court, Docket number 81-611, (November 16, 1981), which will address similar questions within the parameters of the First Amendment.

II: There appears to be a significant diversity of opinion on the questions presented in both the federal and state courts.

I.

This Court has recently noted probable jurisdiction in the case of Globe Newspaper Co. v. Superior Court, docket number 81-611, cert. granted November 16, 1981. A reading of the lower court opinions[1] in that case indicate that the constitutionality of a Massachusetts statute (Mass. G.L. c. 278, §16 A)[2] is being

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[1] 401 NE2d 360 (1980); on remand 423 N.E.2d 772 (1981)

[2] General Laws c. 279 §16 A reads: "At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under 18 years of age is the person upon, with or against whom the crime is alleged to have been committed, or at the trial of a complaint or indictment for getting a woman with child out of wedlock, or for the non-support of an illegitimate child, the presiding justice shall exclude the general public from the courtroom, admitting only such persons as may have a direct interest in the case."

challenged on First Amendment grounds because the statute requires the closure of a court in certain specified cases during the testimony of a complainant who is a minor. Petitioner contends that the New York Statute (§4 Judiciary Law) which gives the trial court unfettered discretion to close the courtroom for the trial of a rape case, for no other reason than the fact it is a rape case, is equally offensive to the Consititution.

In the case at bar, the courtroom was closed over the objection of the petitioner which brings this case within the protection of the Sixth and Fourteenth Amendments of the United States Constitution.

The Supreme Court has already stated that the public trial protection of the Sixth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment (In re Oliver, 333 U.S. 257 (1948); Duncan v. Louisiana, 391 U.S. 145, 148 (1968)).

In Richmond Newspapers Inc. v. Virginia, 448 U.S. 555 (1980), this Court dealt with the right of the press under the First Amendment to a public trial when closure was ordered on request of the defendant with the acquessence of the prosecutor. The Court held that where the closure involved a criminal trial, the exclusion of the press violated the First and Fourteenth Amendment where "the trial judge made no findings to support closure"; failed to inquire into "alternative solutions" which would have "ensured fairness"; and, failed to "recognize any right under the Constitution for the public or press to attend the trial." (Richmond Newspapers, Inc. v. Virginia, supra, p. 580-581). Petitioner contends that an accused is entitled to at least the same protection under the Sixth Amendment as the press is under the First Amendment. Specifically, "absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public" (Richmond Newspapers Inc. v. Virginia, supra., at 581; Also see, People v. March, 419 NE2d 1212, 1216 (Ill, App. 1981)). Consequently, a statute which permits closed criminal trial proceedings without a factual determination necessitating closure, violates the Sixth and Fourteenth Amendments to the Constitution.

The circumstances which resulted in the closure of petitoner's trial are strickingly similar to those which existed in Tanksley v. United States, 145 F2d 58 (9th Cir. 1944) and State v. Schmit, 139 NW2d 800 (Minn. 1966). In both of those cases the order of closure was held to have violated the defendant's right to a public trial. However, petitioner's conviction has been affirmed by a divided appellate court. It is extremely important to note that the petitioner's mother was excluded from the courtroom during the testimony of the complainant (Appendix, A-12).[3] Various courts have held, despite the existence of a statute or state constitutional provision, that the exclusion of a defendant's family, relatives and close friends violates the constitutional protection of the right to a public trial (See, 39 ALR3d 853, Validity and Construction of Constitution or Statute Authorizing Exclusion of Public in Sex Offense Cases, §6 and cases cited therein). Petitioner is unaware of any case where a trial court's exclusion of a family member was upheld after appellate review.

Clearly, the Sixth Amendment right to a public trial is designed to protect certain fundemental rights of an accused separate and apart from the rights of the press which are protected by the First Amendment. The protections or safeguards of the Sixth Amendment are: to assure the accused a fair trial "that the public may see he is fairly dealt with and not justly condemned",[4] to aid in assuring trustworthy testimony,[5] and, keep open the possibility that a witness unknown to either party may attend the public trial.[6]

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[3] The record is unclear as to whether the defendant's father was also excluded. However, since it is arguable that he could be properly excluded since he was subsequently a witness on petitioner's behalf, it is submitted that his absence or presence is not as critical to this precise issue on which petition for certiorari is based.

[4] United States v. Kolbi, 172 F2d 919, 921 (3rd Cir. 1948); Estes v. Texas, 381 U.S. 532, 538-539 (1965); Also see, Cooley, Constitutional Limitations 441 (7th ed. 1903).

[5] People v. Jelke, 308 N.Y. 56, 62 (1954); Also see, 6 Wigmore, Evidence §1834 (J. Chadbourn rev. 1976).

[6] See, Tanksley v. United States, 145 F2d 48, 59 (9th Cir. 1944).

It should be noted that in the case at bar, the trial court allowed members of the Gannett Press to be present during the complainant's testimony. Therefore, the precise issue before the Court in Globe Newspaper Co. is not duplicated in this case.[7] The presence of the press does not mean that a defendant's trial is public since courts have held that allowing the press to attend a criminal trial is not sufficient to protect the Sixth Amendment rights of the accused. (State v. Schmit, 139 NW2d 800, 806 (Minn. 1966); United States v. Kolbi, 172 F2d 919, 923 (3rd Cir. 1948)). It would also appear that if the court was ordering the courtroom closed to save the witness any embarrassment, the Court's order was anomalous. Certainly one group of strangers to whom a person would be reluctant to divulge personal and embarrassing information would be the press.

This Court has recently ruled on the right of the press under the First Amendment to compel attendance at pretrial hearings[8] and trials.[9] In view of the determination of probable jurisdiction in Globe Newspaper Co. v. Superior Court, supra, the Court now appears ready to assess the right of the press under the First Amendment to challenge the temporary closure of a trial, a question specifically left open in the Richmond News case.[10] Thus, the Court will have an opportunity to rule of the propriety of limited closures in certain types of cases in relation to the rights of the press under the First Amendment. However, a major issue still remains unresolved

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[7] In Globe Newspaper Co., the only issue before the Court is the right of the press under the First and Fourteenth Amendments. [See, Globe Newspaper Co. v. Superior Court, 423 N.E.2d 773, 775-776 (1981)]

[8] Gannett Co. v. DePasquale, 443 U.S. 368 (1979)

[9] Richmond Newspapers Inc. v. Virginia, supra.

[10] In Richmond Newspapers Inc. v. Virginia, supra, at pp. 581-582 Fn 18 the Court stated, "We have no occasion here to define the circumstances in which all or parts of a criminal trial may be closed to the public, cf., e.g., 6 J. Wigmore, Evidence §1834 (J. Chadbourn rev. 1976), but our holding today does not mean that the First Amendment rights of the public and representatives of the press are absolute. ..., so may a trial judge, in the interest of the fair administration of justice impose reasonable limitations on access to a trial. ...

regarding the defendant's right to a public trial under the Sixth Amendment when he objects to a limited closure which was ordered in reliance upon a state statute without a factual hearing or any showing of necessity.

The First Amendment issue which is presently before this Court in the Globe Newspaper Co. case is squarely presented in a Sixth Amendment context by the facts of this case.

II.

There appears to be widespread diversity among the federal circuit courts with regard to the temporary closure of trials in certain types of cases. Certain courts have ruled closures impermissible (Tanksley v. United States, 145 F2d 58 (9th Cir. 1944); United States v. Kolbi, 172 F2d 919 (3rd Cir. 1948); Davis v. United States, 247 Fed. 394 (8th Cir. 1917); also see, United States ex rel. Bennett v. Rundle, 419 F2d 599 (3rd Cir. 1969)), while other courts have held certain types of closures permissible (United States ex rel. Latimore v. Sielaff, 561 F2d 691 (7th Cir. 1977); Harris v. Stephens, 361 F2d 888 (8th Cir. 1966) cert. denied 386 U.S. 964 (1967); Aaron v. Capps, 507 F2d 684 (5th Cir. 1975)).[11] The state courts are also in disagreement over the issue of the temporary closure of a criminal trial. Some state courts have found the order of closure improper in the context of the case on appeal (State v. Schmit, supra.; State v. Osborne, 54 Ore. 289 (1909); Rhodes v. State, 102 Neb. 750 (1918); State v. Hensley, 75 Ohio St. 255 (1906)), while one state has gone so far as to declare their statute which provided for closed criminal trials in certain types of cases unconstitutional[12]

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[11] See generally, Note, The Accused's Right to a Public Trial, 42 Notre Dame Law. 499, 499-501 (1967); Note, The Right to a Public Trial in Criminal Cases, 41 N.Y.U.L.Rev. 1139 (1966).

[12] Act No. 408, Local Acts 1893, §18 which provided,

"Whenever it shall appear that, upon the trial of any cause, evidence of licentious, lascivious, degrading, or peculiarly immoral acts or conduct will probably be given, the judge presiding at such trial may, in his discretion, require and cause every person, except those necessarily in attendance thereon, to retire and absent himself or herself from the courtroom during such trial or any portion thereof." (See, People v. Yeager, supra., at p. 229)

(People v. Yeager, 113 Mich. 229 (1897)). Other state court decisions have upheld the temporary closure of a criminal trial over the defendant's objection (People v. Kerrigan, 73 Cal. 222 (1887), but see, People v. Hartman, 103 Cal. 242 (1894); State v. Croak, 167 La. 92 (1928); State v. Callahan, 100 Minn. 63 (1907); State v. Nyhus, 19 N.D. 326 (1909)).

Interestingly, despite the significance of the holding in People v. Jelke, 308 N.Y. 56 (1954), the New York State Court of Appeals has never ruled on the constitutionality of section 4 of the Judiciary Law. In Jelke, the court stated, "concerned as we here are only with cases not encompassed by the special provisions of section 4 of the Judiciary Law, we need not now consider the scope or extent of the rights of a defendant standing trial in one of the cases listed in that statute." (People v. Jelke, supra. at p. 68; emphasis supplied).

Petitioner asserts that the unfettered discretion given a court to order closure because the charge is rape, for example, violates the defendant's right to a public trial as guaranteed by the Sixth, Fourteenth and First Amendments to our Constitution. Here the record clearly demonstrates that the order for closure was based totally on the discretion permitted by §4 of the Judiciary Law. The record contains no assertion or evidence demonstrating the inability of the complainant to testify because of fear or embarrassment. Nor was the decision of the lower court based on such a finding. In fact, the record clearly establishes that the determination of the lower court was based solely on the discretion afforded the court by section 4 of the Judiciary Law. As the dissenting opinion at the Appellate Division stated,

> The testimony of the complainant in the instant case, however, does not reveal the need for closure. She was a 29 year old married woman of average intelligence who related the incident without apparent difficulty. Nor were the facts of such lurid character as to warrant protection of the witness from emotional trauma or of the public from salacious testimony (see People v. Jelke, supra). That is not to say that

> the complainant was not embarrassed or reluctant to recount openly the facts pertaining to the charge. That, however, is true in most rape cases and is not a sufficiently compelling reason to support a suspension of a constitutional right over defendant's objection (see Tanksley v. United States, 145 F2d 58; cf. United States ex rel. Latimore, 561 F2d 691, supra). [Hon. M. Dolores Denman, Appendix A-8]

The unlimited discretion provided by the New York Statute to authorize the closure of a criminal trial without any type of hearing or determination that closure is necessary, violates our constitutional public trial protection. A number of courts, including the Supreme Court, have suggested that hearings be conducted to insure that a closure is necessary. (See, Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 580-581 (1980); United States ex rel. Lloyd v. Vincent, 520 F2d 1272, 1275 (2nd Cir. 1975), cert. denied 423 U.S. 937 (1975); United States v. Eisner, 533 F2d 987, 994 (6th Cir. 1976), cert. denied 429 U.S. 919 (1976); United States ex rel. Latimore v. Sielaff, supra, at p. 696).

As suggested by the dissenting opinion below, if the decision of the majority is permitted to stand, "closure would be permissible in any case enumerated in section 4 of the Judiciary Law,...., without requiring the court to articulate the reasons for such action. The mere fact that the case involves a charge of rape, for instance, would trigger the exercise of the court's discretion to exclude the public. Thus, closure, not public trial, would be the norm in such cases." (Appendix, A-7).

Petitioner respectfully submits that the New York Statute as written and applied to his case violates his right to a public trial as guaranteed by the Sixth and Fourteenth Amendments to our Constitution.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No.

RICHARD LEE DAWSON,

Petitioner,

-vs-

STATE OF NEW YORK,

Respondent.

APPENDIX

EDWARD JOHN NOWAK, ESQ.
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State of New York
Court of Appeals

BEFORE: HON. DOMENICK L. GABRIELLI, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

RICHARD LEE DAWSON,

Movant-appellant

CERTIFICATE
DENYING
LEAVE

I, DOMENICK L. GABRIELLI, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York
Jan. 7, 1982

Associate Judge

*Description of Order: Order of the Appellate Division, Fourth Judicial Department, entered November 13, 1981 which affirmed a judgment of the Supreme Court, Monroe County, rendered on December 3, 1976.

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

PRESENT: HANCOCK, J.P., CALLAHAN, DOERR, DENMAN, SCHNEPP, JJ.

People of the State of New York, Respondent,

-v-

Richard Lee Dawson, Appellant.

The above named Richard Lee Dawson

having appealed to this Court from a judgment

of the Supreme Court, entered in the

Monroe County Clerk's office on December 3, 1976

and said appeal having been argued by

Brian Shiffrin of counsel for appellant,

Glenda Brayman of counsel for respondent,

and due deliberation having been had thereon,

It is hereby ORDERED, That the judgment so appealed from be and the same hereby is affirmed.

Memorandum, which is hereby made a part hereof.

All concur, except Doerr and Denman, JJ., who dissent and vote to reverse the judgment and grant a new trial, in an Opinion by Denman, J.

Entered: NOV 13 1978

MARY F. ZOLLER, *Clerk*

Appellate Division —— Fourth Department

Decisions Filed November 13, 1981

821. (Monroe Co.) — People of the State of New York, Respondent, v Richard Lee Dawson, Appellant. — Judgment affirmed. Memorandum: We find no reversible error in the court's failure to specify its reasons for exercising its discretion in making the order of exclusion. We note that defendant made no request for a hearing and voiced only a general objection to the court's ruling. Moreover, this was a trial of a rape charge in which the Legislature has given the trial court discretion to exclude persons not directly interested (Judiciary Law, §4) (see People v. Pollock, 50 NY2d 547, 550). We have considered the other grounds raised by defendant and find them to be without merit. All concur, except Doerr and Denman, JJ., who dissent and vote to reverse the judgment and grant a new trial, in an opinion by Denman, J. (Appeal from Judgment of Monroe Supreme Court, Boehm, J. — Rape, 1st degree, etc.) Present: Hancock, J.P., Callahan, Doerr, Denman, Schnepp, JJ.

THIS OPINION IS UNCORRECTED AND
SUBJECT TO REVISION BEFORE
PUBLICATION IN THE NEW YORK REPOR

SUPREME COURT STATE OF NEW YORK
APPELLATE DIVISION FOURTH DEPARTMENT

People of the State of New York, Respondent,

-vs-

#821/1981

Richard Lee Dawson, Appellant.

ARGUED: September 18, 1981
DECIDED: November 13, 1981

PRESENT:
HON. STEWART F. HANCOCK, JR., Justice Presiding

HON. JOHN J. CALLAHAN,
HON. JOHN H. DOERR,
HON. M. DOLORES DENMAN,
HON. EMMETT J. SCHNEPP, Associate Justices

Appeal from Judgment of Monroe Supreme Court, Boehm, J. - Rape, 1st degree, etc.

APPEARANCES:

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(Glenda Brayman, Esq., of counsel)

Denman, J. (dissenting)

The majority hold that the unexplained exclusion from the courtroom of everyone except the press did not deprive defendant of his 6th Amendment right to a public trial. We disagree.

The fundamental right to a public trial is so deeply ingrained in our jurisprudence as to require no explication. Indeed, so pervasive is its nature that it is guaranteed not only to an accused (US Const, 6th Amdt; Civil Rights Law, § 12) but may be asserted by the public and the press (Judiciary Law, § 4; Matter of Westchester Rockland Newspaper v Leggett, 48 NY2d 430, 437; Matter of Gannett Co. v DePasquale, 43 NY2d 370, affd 443 US 368).

> "Public trials, of necessity, serve a twofold purpose. They safeguard an accused's right to be dealt with fairly and not to be unjustly condemned (Estes v Texas, 381 U.S. 532, 539; 1 Cooley, Constitutional Limitations [8th ed], p 647) and concomitantly, serve to instill a sense of public trust in our judicial process by preventing the abuses of secret tribunals as exemplified by the Inquisition, Star Chamber and lettre de cachet (Matter of Oliver, 333 U.S. 257, 270, n 24; Lewis v Peyton, 352 F.2d 791, 792 [4th Cir.]; United States v Lopez, 328 F. Supp. 1077, 1087 [EDNY]). (People v Hinton, 31 NY2d 71, 73.)

Fundamental though it may be, such right is not absolute. A trial court may, in the proper exercise of discretion, suspend that right and close the trial to the public (People v Doty, 73 AD2d 802). Such discretion extends to a variety of situations each with its own legal underpinnings. Courts may order closure for certain pretrial hearings in order to guarantee a defendant's constitutional right to a fair trial (Gannett Co. v DePasquale, 443 US 368;

Matter of Westchester Rockland Newspaper v Leggett, 48 NY2d 430, supra) They may so order under their inherent power to preserve order and decorum in the courtroom, to protect the rights of parties and witnesses, and generally to further the administration of justice (People v Jones, 47 NY2d 409, cert den 444 US 946; People v Jelke, 308 NY 56). Further, section 4 of the Judiciary Law provides for exclusion of the public, in the court's discretion, as follows:

> The sittings of every court within this state shall be public, and every citizen may freely attend the same, except that in all proceedings and trials in cases for divorce, seduction, abortion, rape, assault with intent to commit rape, sodomy, bastardy or filiation, the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses, and officers of the court.

In all cases, however, a public trial is the norm and an improper denial of a defendant's right to a public trial requires reversal of his conviction despite the absence of a demonstration of prejudice (People v Jones, supra; People v Doty, supra). An order of closure must be warranted by compelling or unusual circumstances (People v Hinton, 31 NY2d 71, 75-76, cert den 410 US 911; People v Doty, supra) and there must be a sufficient factual showing of such circumstances spread on the record.

> "[N]o closing can be tolerated that is not preceded by an inquiry careful enough to assure the court that the defendant's right to a public trial is not being sacrificed for less than compelling reasons." (People v Jones, supra, p 414-415).

In the instant case, there was no demonstration on the record of any compelling or unusual circumstances prior to the

order of closure. The record reveals only a brief colloquy in which the assistant district attorney requested that the court exclude all spectators during the direct and cross-examination of the complainant. In response to defense counsel's opposition, the court stated that although all spectators would be excluded, the ban would not apply to representatives of the press "in order to guarantee [defendant's] right to an open trial." Regardless of whether members of the press were, in fact, present, and the record is silent on this point, exclusion of the public with the exception of a select class is insufficient to insure a defendant's right to open proceedings (People v Jelke, 308 NY 56, 66, supra; People v Doty, 73 AD2d 802, 803, supra).

Under the majority view closure would be permissible in any case enumerated in section 4 of the Judiciary Law, supra, without requiring the court to articulate the reasons for such action. The mere fact that the case involves a charge of rape, for instance, would trigger the exercise of the court's discretion to exclude the public. Thus closure, not public trial, would be the norm in such cases. Surely that is neither desirable nor the intent of the statute. To the contrary, the clear thrust of the statute is to insure public proceedings, not to provide means for exclusion.

Exclusion of spectators during the testimony of the victim of an alleged rape may, of course, be justified in some instances. The Supreme Court has recognized that, short of homicide, rape is the "ultimate violation of self" and is

characterized by an "almost total contempt for the personal integrity and autonomy of the female victim" (Coker v Georgia, 433 US 584, 597). There are certainly many situations in which those with only a prurient interest in the testimony should be excluded in order to protect the victim from untoward embarrassment and loss of dignity (see United States ex rel. Latimore v Sielaff, 561 F 2d 691).

The testimony of complainant in the instant case, however, does not reveal the need for closure. She was a 29 year old married woman of average intelligence who related the incident without apparent difficulty. Nor were the facts of such lurid character as to warrant protection of the witness from emotional trauma or of the public from salacious testimony (see People v Jelke, supra). That is not to say that the complainant was not embarrassed or reluctant to recount openly the facts pertaining to the charge. That, however, is true in most rape cases and is not a sufficiently compelling reason to support a suspension of a constitutional right over defendant's objection (see Tanksley v United States, 145 F2d 58; cf. United States ex rel. Latimore, 561 F2d 691, supra).

It is only when the People assert compelling reasons for closure and the court makes a determination of the necessity therefore, on the record, that a defendant may intelligently oppose the application in the first instance and an appellate court may pass on the propriety of the discretionary ruling. A departure

(Previous unrelated matter deleted)

* * * *

THE COURT: ... . I understood you had another application, Mr. Jesserer, with respect to the testimony of the victim.

MR. JESSERER: That's correct, your Honor. My first witness this morning will be Mrs. Haley, who is the victim in this matter, and I would request that the Court exclude also spectators from the courtroom during the course of her direc and cross-examination and any further examination during the trial.

THE COURT: Mr. Miller.

MR. MILLER: Your Honor, I would oppose that application.

THE COURT: He does have a right to a speedy and open trial. I am going to preserve his right

to an open trial, but at the same time take into consideration the nature of the charges and what is alleged to have occurred here. I am, therefore, going to ban spectators from the courtroom, but in order to guarantee his right to an open trial, that ban will exclude any representatives of the press.

MR. MILLER: I respectfully except to that, if the Court please, the ruling, sir.

* * * *

(The opening statement of the prosecutor to the court followed)

* * * *

THE COURT: All spectators, except representatives of the press, are excluded.

MR. MILLER: Your Honor, the defendant's mother, is she precluded, too?

THE COURT: How old is the defendant?

MR. MILLER: The defendant is 19.

THE COURT: Yes, she is excluded.

MIRANDA HALEY, called herein as a witness on behalf of the People of the State of New York, having first been duly sworn by the Clerk of the Court, was examined and testified as follows:

THE COURT: Mrs. Haley, how do you spell your last name?

THE WITNESS: H-a-l-e-y.

THE COURT: Mrs. Haley, I know that this is going to be not an easy or pleasant thing for you. It may become rather difficult. Take your time. There is no jury here. The only one you have to be concerned about hearing you is myself, because I will be making the determinations of fact here. If at any point you want to pause or recess, just indicate that. Okay?

THE WITNESS: Yes.

DIRECT EXAMINATION BY MR. JESSEKER:

Q. Would you like a drink of water, Mrs. Haley?

A. Yes.

THE COURT: Mr. Clifford will get it for her. He was just making sure the courtroom is battened down. We have an attendant there now.

Q. Mrs. Haley, how old are you, ma'am?

A. Twenty-nine.

Q. On March 20, 1975, how old were you then?

A. Twenty-seven.

Q. Are you married?

A. Yes.

Q. How long have you been married?

A. Seven years.

Q. Do you have any children?

A. One.

Q. How old is your child?

A. He is now three years.

Q. You have to talk right up so everybody can hear you.

* * * *

SUPREME COURT OF THE UNITED STATES

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

RICHARD LEE DAWSON,

Petitioner,

-vs-

STATE OF NEW YORK,

Respondent.

Petitioner, Richard Lee Dawson, who is now held in the New York State Correctional Facility at Elmira, New York, asks leave to file the attached petition for a writ of certiorari to the Supreme Court of New York, Appellate Division, Fourth Judicial Department without prepayment of costs and to proceed in forma pauperis. An application to proceed as a poor person was made to the Court below and that application was granted. The petitioner's affidavit in support of this petition is attached hereto.

Edward John Nowak
Counsel for Petitioner

AFFIDAVIT IN SUPPORT OF PETITION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

RICHARD LEE DAWSON,

Petitioner,

-vs-

STATE OF NEW YORK,

Respondent.

I, Richard Lee Dawson, being first duly sworn according to law, depose and say that I am the petitioner in the above-entitled cause, and, in support of my application for leave to proceed without being required to prepay costs or fees, state:

1. Because of my proverty I am unable to pay the costs of said cause.

2. I am unable to give security for the same.

3. I believe that I am entitled to the redress I seek in said cause.

4. The nature of said cause is briefly stated as follows:

I was convicted of rape, first degree and robbery, second degree on December 3, 1976, in New York State Supreme Court, County of Monroe, Rochester, New York. My conviction was affirmed by a divided appellate court (People v. Dawson, 442 N.Y.S.2d 333) that held my right to a public trial was not denied when the

court closed the courtroom, over objection of my counsel, during the testimony of the complainant. My application for permission to appeal to the Court of Appeals was denied. I have exhausted my appellate remedies in the State of New York and my conviction stands affirmed. I respectfully pray that the United States Supreme Court review the determination of the New York Courts.

Richard L. Dawson

RICHARD LEE DAWSON

this 25th day of February 1982

E. Gene Callihan

NOTARY PUBLIC

E. GENE CALLIHAN
Notary Public # 8578880
Chautauqua County, New York State
Commission Expires March 30, 1982

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-6340

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SUPREME COURT, U.S.

RICHARD LEE DAWSON,

Petitioner,

-vs-

STATE OF NEW YORK,

Respondent.

Respondent's Brief in Opposition
to the
Petition for Writ of Certiorari to the
Supreme Court of New York
Appellate Division, Fourth Judicial Department

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Statement of the Case

Petitioner was charged with Forcible Rape (New York Penal Law §130.35) and Robbery, second degree (New York Penal Law §160.10).

At his request, he was tried before a judge without a jury. Just prior to the start of the trial, the trial prosecutor requested that the court exclude spectators from the courtroom during the victim's testimony. Defense counsel objected and the court allowed representatives of the press to remain, but excluded all others.

Just prior to the victim being called as a witness, the court excluded all spectators except representatives of the press from the courtroom. No specific objection was made, but defense counsel asked if the exclusion applied to the defendant's mother. The court, after determining that the defendant was an adult (he was 19), said that the mother was also excluded.

When the victim's testimony was completed, the courtroom was once again open to all.

After trial, petitioner was found guilty of the rape and robbery charges and sentenced.

The conviction was affirmed on appeal by the intermediate appellate court, and leave for further appeal was denied. The decision below, sub nom People v. Dawson, is reported in 84 A.D.2d 957 (Fourth Dept., 1981), 444 N.Y.S. 2d 333.

Argument

Petitioner's Constitutional rights were not violated, and in any event, the narrow question presented is not preserved for review.

Petitioner's major contention seems to be that his Sixth Amendment right to a public trial was violated by the trial judge's decision to exclude the public from the courtroom during the testimony of the victim.

Considering the recent decisions of this Court in Gannett Co. v. DePasquale, 443 U.S. 368 (1979) and Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), it is clear that the press and the public each have the right to attend a criminal trial, and the criminal defendant has the right to be tried before the public. Furthermore, "absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 581 (footnote omitted).

The courts of New York have recognized these rights, and there is no showing that the courts of New York have tended to limit them. Matter of Westchester-Rockland Newspapers, 48 N.Y.2d 430 (1979); Matter of Hearst Corp. v. Clyne, 50 N.Y.2d 707 (1980).

In this case, the public (but not the press) was excluded only during the testimony of the victim. The trial judge made that discretionary ruling pursuant to statute (New York Judiciary Law §4, McKinney's Consolidated Laws of New York, book 29).

It is clear from the trial transcript that there was some discussion of the prosecutor's motion before it was made: the opening remark by the judge was "I understand you had another application, Mr. Jesserer, with respect to the testimony of the victim."

The specific issue would appear to be whether petitioner at that point had a right to a hearing on the motion. Assuming he had such right, no such request was made. Later, when defense counsel asked whether the mother was to be excluded, it is not clear whether he was asking for clarification, or whether he was indicating an objection. What is clear is that no specific objection was made and no request for any particular person or persons to be allowed to remain was made.

The trial judge was simply exercising his discretion under the statute; his determination that the several rights involved could best be protected by allowing the press to remain and excluding all others, does not, by itself, violate the Constitution. In addition, the fact that the trial judge did not articulate specific findings doesn't mean he didn't consider the matter and make the necessary findings, at least sub silentio. Since there was only a general objection, the judge made a ruling with but a generalized comment. We would also point out that no detailed findings were necessary. The trial judge either believed justice would better be served

by allowing the witness to testify free from the embarrassment of public display, or he did not. This trial took place in 1976, long before the requirement for articulated findings was established.

We respectfully urge therefore that petitioner's Constitutional rights were not violated during the trial and that no substantial Constitutional question was preserved for review by this Court.

Conclusion

Petitioner's Constitutional rights were fully protected during the trial, and, in any event, no substantial Constitutional question is presented by the trial record. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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